

HOUSE BILL REPORT

HB 1154

As Reported by House Committee On:
Commerce & Labor

Title: An act relating to employment decisions based on consumption of lawful products.

Brief Description: Regulating employment decisions based on the consumption of lawful tobacco products.

Sponsors: Representatives Morrell, Conway, Grant, Sells, Blake, Moeller, Eickmeyer, Appleton, Kenney, Flannigan, Hudgins, Williams, Ormsby and Simpson.

Brief History:

Committee Activity:

Commerce & Labor: 1/26/07, 2/26/07 [DPS].

Brief Summary of Substitute Bill

- Prohibits employers from requiring employees or applicants to: (1) disclose whether they consumed lawful tobacco products at any time, or (2) agree not to consume lawful tobacco products off the premises of the employer during nonworking hours.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

Minority Report: Do not pass. Signed by 2 members: Representatives Condotta, Ranking Minority Member and Chandler, Assistant Ranking Minority Member.

Staff: Joan Elgee (786-7106).

Background:

Smoking in places of employment is prohibited under Initiative 901, passed in 2005. No state law, however, prohibits employers from requiring employees or applicants to disclose whether

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they consume lawful tobacco products or requiring employees or applicants to agree not to consume lawful tobacco products off the employer's premises during nonworking hours.

Summary of Substitute Bill:

An employer is prohibited from requiring an employee or applicant to disclose verbally or in writing whether he or she consumed lawful tobacco products at any time before or during employment with the employer. An employer is also prohibited from requiring employees or applicants to agree verbally or in writing not to consume lawful tobacco products off the premises of the employer during nonworking hours. An employer is any person, firm, corporation, or the state, political subdivisions, or municipal corporations.

Exceptions are provided. An employer may require disclosure of consumption of or an agreement not to consume lawful tobacco products:

- under a legitimate conflict of interest policy;
- to meet bona fide occupational qualifications, including qualifications to screen for respiratory diseases in occupations where the individual will be exposed to smoke and noxious fumes;
- under the terms of the employer's drug and alcohol free workplace program;
- under the terms of an employer's insurance policy or wellness program, as otherwise permitted by law; or
- if the employer is a religious or health organization whose tenets prohibit the use of an otherwise lawful tobacco product or a company or nonprofit organization whose primary business purpose is the prevention of cancer or heart and lung disease.

The requirements do not apply to any matter that is also subject to collective bargaining.

An employer may adopt a policy prohibiting the consumption of lawful tobacco products on the employer's premises or during working hours, or both.

Penalties are provided. A person violating the provisions commits a misdemeanor. An aggrieved applicant or employee may also bring a civil action alleging a violation. The court may award \$500 in addition to any award of actual damages, and if reasonable attorneys' fees and costs to the prevailing employee or applicant. The court may also award any prevailing party reasonable expenses and attorneys' fees upon written findings that the action was frivolous and advanced without reasonable cause.

Substitute Bill Compared to Original Bill:

The original bill prohibited an employer from refusing to hire or discharging an individual or otherwise disadvantaging an individual based on the consumption of lawful tobacco products off the premises of the employer during nonworking hours. The substitute bill instead prohibits requiring the disclosure of consumption of or an agreement not to consume lawful tobacco products. The exceptions are modified to add an employer's insurance or wellness program, add companies or nonprofit organizations whose primary business purpose is the

prevention of cancer, and delete a provision allowing disadvantaging an individual for failure to meet job-related standards. The provision stating that nothing precludes an employer from adopting policies prohibiting the consumption of lawful tobacco products on the employer's premises or during working hours, or both, is added. The penalty provisions are changed to add the misdemeanor and \$500 civil penalty, delete the six month period for filing a civil action, and add the award of attorneys' fees and expenses for frivolous actions. The definition of employer is added.

Appropriation: None.

Fiscal Note: Available on original bill.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Last year's bill started out much broader. I'm a critical care nurse and I really wish people did not smoke. However, if you do smoke off the job it shouldn't cost you your job. It's a very tough habit to quit; tobacco is a legal product and you are doing it on your own time. This is a slippery slope. What is next -- body mass, DNA for health conditions? The carrot approach works better than discriminating against smokers.

(With amendment) We want to make sure we can continue to have employee wellness programs or incentives for wellness.

(Opposed) This bill was promoted by the tobacco lobby years ago. It violates the employment-at-will doctrine and puts small businesses in an untenable situation. Maybe a client doesn't like the employee smelling like smoke; if the employer takes action is the employer liable? What about allergies and day cares? An individual could claim an employer took action because the individual smoked but the employer may not even know the employee smoked. It is not unreasonable to have \$30,000 - \$50,000 in legal defense costs. This isn't a real problem. This bill trivializes the law against discrimination. If the bill moves, we have some amendment ideas to allow nonsmoking on the premises during office hours and vice versa.

Persons Testifying: (In support) Representative Morrell, prime sponsor.

(With amendment) Ken Bertrand, Group Health Cooperative.

(Opposed) Carolyn Logue, National Federation of Independent Business; Gary Smith, Independent Business Association; and Kris Tefft, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.